UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MONIQUE DA SILVA MOORE, ET AL.,

Plaintiffs,

v. 11 CV 1279 (ALC) (AJP)

PUBLICIS GROUPE SA, ET AL.,

Defendants.

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New York, N.Y.
April 25, 2012
2:06 p.m.

Before:

HON. ANDREW J. PECK

Magistrate Judge

APPEARANCES

SANFORD, WITTELS & HEISLER, LLP
Attorneys for Plaintiffs
BY: STEVEN LANCE WITTELS
DEEPIKA BAINS
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JACKSON LEWIS LLP
Attorneys for Defendant MSLGroup
BY: BRETT M. ANDERS
JEFFREY W. BRECHER

MORGAN, LEWIS & BOCKIUS LLP
Attorney for Defendant Publicis Groupe SA
BY: PAUL C. EVANS

(In open court; case called)

THE COURT: What are the issues? Since you're here, I assume there must be some issues. Let's start with the plaintiff.

Just remind me who you are.

MR. WITTELS: Yes, your Honor. Steven Wittels from Sanford Wittels & Heisler for the plaintiffs.

Your Honor, we would ask on behalf of plaintiffs and the class we've moved to certify that your Honor issue a stay of discovery in this case until after Judge Carter has ruled on the pending motions for class certification of the EPA.

THE COURT: The request is denied.

Next.

MR. WITTELS: May I just explain why we think it's appropriate.

THE COURT: Sure.

MR. WITTELS: The reason we believe it's appropriate is because presently there is an extension of ESI discovery until September. The current discovery cutoff is June. If Judge Carter rules, and we don't know when he would rule, and grants class certification of the EPA class, as well as allowing us to amend the complaint, there will be a significant issue with respect to the scope of discovery that defendants apparently would agree to produce at that time.

Given your Honor's prior rulings in this case,

referencing one of them on February 8, at page 20, your Honor had decreed that the class discovery would be -- well, that the discovery would not be to all class issues but would be limited, in fact, to the seven plaintiffs we have presently. Our position was that --

THE COURT: Let me interrupt for one minute. And just correct me if I'm wrong.

You moved for collective action, but you still have not moved for class certification; is that correct?

MR. WITTELS: Yes. We need certain --

THE COURT: Well, you know, we've talked about that before. And, you know, you sold this schedule to the original judge, I think. And you or one of your colleagues got very upset when I thought and suggested that that date be moved.

You can't have it all ways from Sunday. I understand you may need some discovery for that motion. But you've set it up in a way that you're putting the cart before the horse. And you're going to have to live with that.

Now, meanwhile, as -- to correct one other statement you made, the discovery cutoff is no longer June for obvious reasons.

Now, you could convince me that the schedule you and defendants have agreed on, which seems to be the first thing in the history of the universe that you all have agreed upon and haven't backtracked from, I could be convinced that that's much

too leisurely. But I took you all at your word that that was what was necessary. I had said when we were discussing the ESI protocol and all of that, that if that took longer, that I wasn't going to hold you to the original discovery cutoff date. What that ultimate cutoff date will be is something that we'll figure out once document production has been determined. Meanwhile, we'll see how long it takes for Judge Carter to deal with the motion for class -- sorry, for the collective action and whatever notices have to go out on that.

But you can't keep holding the case in limbo merely because you want to take your time when it's in your interest, and serve motions on your time schedule, not anyone else's.

So if there's anything you'd like to say so you have a complete record, feel free.

MR. WITTELS: Thank you.

May I just ask for a clarification. When you said there is no longer a June cutoff, what your Honor meant by that? Maybe I missed an order on that.

THE COURT: Maybe you weren't here and you didn't read the transcript.

But, obviously, if you're not going to have all the documents under the protocol until somewhere in the neighborhood of September, either you shouldn't get the documents at all because it's useless, or obviously there can't be a June discovery cutoff date.

I've made that clear before. And I really do think with the tag teaming of lawyers in this case on your side you guys got to talk to each other.

MR. WITTELS: Well, is your Honor amenable to entering an order then that extends the discovery cutoff --

THE COURT: Are you from the New York office or the California office?

MR. WITTELS: From the New York.

THE COURT: Excuse me?

MR. WITTELS: New York. What was that?

THE COURT: You seem to be picking up the infection of your colleague in California that you don't seem to know how we practice law in this court.

MR. WITTELS: I've been practicing here for over 25 years.

THE COURT: Good. What don't you understand about transcripts or orders?

MR. WITTELS: Well, your Honor, is there -- I don't think there's an order which extends the discovery cutoff beyond June 30.

Presently there's an ESI order from your Honor extending it to September 7.

THE COURT: Would you like me to leave the cutoff where it is and say there will be no ESI discovery?

You're talking nonsense.

MR. WITTELS: Okay, your Honor.

I'd like to -- I'd like to put on the record then the reasons why we believe there should be a stay, which I hadn't finished.

The other reason is that defendants have repeatedly brought up the issue of the burden of costs and insisting that when they came jointly with us to your Honor with a letter in March, that they wanted to wait until Judge Carter's ruling so there would be no increase cost associated with the ESI given that the scope of discovery wouldn't change from their perspective.

THE COURT: Are you prepared to make your class certification now if I hold off on discovery?

MR. WITTELS: No, your Honor. We need --

THE COURT: Then what's the point, counsel?

MR. WITTELS: My point is that under Wal-Mart v. Dukes which talks about getting discovery that shows a common practice and policy; and Rossini v. Ogilvy, which is the Second Circuit --

THE COURT: Counsel, counsel, let me be clear, which I may not have been.

You're asking for the Court to stay discovery while your collective action motion is pending and your motion to amend is pending.

Assume Judge Carter grants your collective action

motion and that a certain number of plaintiffs opt in, but that it's not everybody who could possibly be in the class, you are still saying you want to complete discovery before you file your class certification motion. And then you want to do everything all over again. So this makes no sense.

MR. WITTELS: In many of the cases, if not all that I'm involved in, on terms of whether it's Title VII, whether it's a collective action in a FLSA context, whether it's a consumer fraud, the courts very frequently have a two-stage discovery process; wherein the first phase you do class discovery; and then the second phase you do merits discovery. That's what we did in the Novartis case that ended up in front of Judge McMahon. It was a two-stage process.

We need discovery in a wide basis, not limited to seven plaintiffs. Because the rule in Rossini and Hnot, 228 F.R.D. 476, is that you need discovery showing how the decisions of the corporation would affect many other employees, not just the seven at issue in this case.

THE COURT: You have not asked for a separate class discovery period. You want everything.

What am I missing?

MR. WITTELS: Well, will your --

THE COURT: If I were to say -- and we'll put aside the collective action. And frankly, I have every reason to believe Judge Carter will be deciding all your motions quickly.

But I can't guarantee that, obviously. It's a guess.

If you were to do very limited -- well, appropriate discovery solely for purposes of deciding to move for class certification, what would you need?

Because if it's everything anyway, then what you're basically saying is whether or not a class is ever certified and whether or not we move for class certification, we want discovery as if a class were certified.

MR. WITTELS: Well, discovery must be broad enough in the class discovery phase.

THE COURT: Specifically.

Counsel, I understand.

Specifically tell me what you want. You want a deposition or two, or do you want all the ESI you've already asked for and then some?

MR. WITTELS: Well when you say "and then some," your Honor, we need to evaluate the ESI. We also would want targeted --

THE COURT: What's the process of staying discovery. You need this regardless is what you are saying. But you want it stayed.

MR. WITTELS: Well, the defendants have taken the position we're not giving you any discovery beyond the seven people. If there are decisions regarding employees who are not among the seven and there --

THE COURT: If there is a company-wide policy, you are entitled to that.

You are not entitled, because that's called blackmail to convince the defendant to settle, to say I need information about virtually every employee who might be in the class, which obviously is extraordinarily expensive, in order to prove that there is a class. That's not what the case law says. And that's what you seem to be asking for. While at the same time saying let's stay discovery. So I don't know if your funding source has run out. But you keep reinventing the wheel at every conference.

MR. WITTELS: We're asking for a stay because we're being blocked in terms of our discovery.

THE COURT: You're not being blocked of any legitimate discovery. And if you are, either you're being blocked by me, in which case when Judge Carter rules you'll get an ultimate decision on that, ultimate subject to going to the circuit at the end of the case. Or you're being blocked because you and they are not agreeing. And I have not had any discovery issue brought before me on that issue.

MR. WITTELS: Your Honor, because of your prior rulings, the discovery -- the defendants have taken the position that they don't have to produce discovery that we feel should be produced under Wal-Mart, Rossini, Hnot and all of the Second Circuit cases.

THE COURT: Counsel if you say I've ruled on it, then I've ruled. And Judge Carter will deal with it. Because presumably that's something that's in front of Judge Carter.

MR. WITTELS: Well what's not, I believe, in front of Judge Carter is the fact that defendants are not producing discovery beyond the seven and are now using your Honor's prior rulings to block legitimate class discovery.

Therefore, they've taken the position if there is change -- and I have an e-mail from them on this point.

THE COURT: First of all, is this an issue you want me to rule on, or is this because -- and this is not the clean Supreme Court oral argument where you get to argue and then the red light comes on and you're done. But let's try to keep one issue at a time.

MR. WITTELS: Well, my argument is as to why there should be a stay. And the argument I'm making is that defendants, as recently as two days ago, have told us in an e-mail that they won't produce any additional documents relating to the complaints other than what we've already produced. And this is a quote: If the motion to file a second amended complaint is granted, we might revisit this.

THE COURT: Okay.

MR. WITTELS: So their position is if there is a change --

THE COURT: Let me ask --

MR. WITTELS: Sorry.

THE COURT: Let me ask the defendants. Are you joining in this application as a way to save money?

MR. BRECHER: No, your Honor. We do not join in this application. Thank you.

THE COURT: Then my ruling stands.

Anything else?

MR. WITTELS: If your Honor will not stay it, I would ask you to extend the discovery period for a year after certification is granted and the reason for that is --

THE COURT: I will deal with any issues on a what-if when the what-if comes to pass.

MR. WITTELS: Meaning if there is a ruling by Judge Carter in favor of class --

THE COURT: If Judge Carter gives you a class certification, and discovery is necessary, and you haven't slept on your rights -- you know, my question, quite seriously, goes back to what we've talked about before.

When are you moving for class certification?

Right now the deadline is April 1. You move -- sorry. April 1 -- that can't be right.

What is the old deadline? The one that came from Judge Sullivan, if I'm remembering right, which was supposedly when discovery was ending at one point. I think it's April 1, 2013. And although I looked at that date and said how on earth

could it be that far out?

MR. BRECHER: Judge, I think that is correct.

I don't have the order in front of me, the original scheduling order from Judge Sullivan. But my recollection was after the completion of fact discovery, then there was going to be a period of expert discovery. And then after that, class cert. motions.

THE COURT: Okay. If that's the date you're still aiming at, I'm going to have to change the date.

MR. WITTELS: We'd ask that you allow that date to stand, your Honor. It's necessary given that we're not able to get --

THE COURT: But then you want -- you want to make the motion in April of 2013 when otherwise discovery is all over. And then you want a chance, if the motion is granted, for new discovery.

Is that what you're telling me?

MR. WITTELS: No, your Honor.

THE COURT: Okay.

MR. WITTELS: Judge Sullivan's order number ten of August 9, 2011 said the motion shall be filed no later than April 1, 2013.

THE COURT: I've yet to see a lawyer who files something before a deadline. But you've done lots of things that other lawyers don't do. So maybe you will.

Look, you'll file your motion when you file your motion. The repercussions of that will be the repercussions of that.

Or you can tell me that you're going to file your motion sooner but after you've had some significant discovery here. And then I can think about the ramifications of it. You can't have it both ways.

So if you're sticking to the April 1, 2013 date, you're sticking to it. What the ramifications of that will be is something that we can all worry about once the motion is granted, if it's granted.

MR. WITTELS: All right.

My final request, your Honor, is that your Honor not issue orders in this case until the recusal motion is decided.

THE COURT: Or until the motions you want get decided.

You started this conference asking me to rule on something. And now you say well, I didn't win that one so why don't you not rule on anything.

What makes sense about the way you've presented your arguments? Other than, you know, if you win, it's good, and it isn't affected by the recusal motion. But if, heaven forbid, you lose, then you go to your recusal.

MR. WITTELS: We feel, your Honor --

THE COURT: Why didn't you just waive that argument by asking me to rule on two or three things in the course of the

discussion we just had?

MR. WITTELS: The reason, frankly, your Honor is I believe that you were not going to grant the stays, and that we requested. And given the tenor of the case thus far, I didn't want to antagonize you.

THE COURT: I think you're a little late on that Mr. Wittels.

MR. WITTELS: Well the intent is not to antagonize the Court at any time, your Honor. I brought it up because I had asked your Honor not to rule any further until it's decided. I think that's the appropriate thing to do.

THE COURT: Request is denied.

MR. WITTELS: Thank you.

THE COURT: You waited forever to file the motion. You filed a letter application for recusal. And when I said you want me to rule on that and give the defendants a chance to respond to the letter, or do you want a motion? And you took another, whatever it was, two, three weeks to do the motion on a schedule you set. And now it's nothing can go on in the case unless it favors you.

So I will rule on the recusal motion when it is fully briefed and when I have time to get to it, although it will get a high priority. But at this point I'm not granting you a stay of my activity on the case. You cannot get such a stay merely by making a disqualification motion. You want to take this to

the circuit, go wherever you want.

Anything else from the plaintiff?

MR. WITTELS: Just to respond briefly to your Honor's point about dealing things under our own schedule. We moved as quickly as we could once we had a full set of facts and information that we believe supported our --

THE COURT: First of all, that's nonsense. And second of all, your letter had basically everything except bells and whistles that was in your motion. So, it should not have taken as long as it did if you thought that the case should stop dead in its tracks while the motion was pending.

MR. WITTELS: We did make a motion -- as part of our application in our notice of motion, we specified that your Honor not make any further rulings in the case.

THE COURT: Yes, but I didn't hear that you were elected to the Court of Appeals or the Supreme Court.

Yes. You asked for that relief.

MR. WITTELS: Yes.

THE COURT: You didn't bring it on by an order to show cause or anything else.

I assume that you know that defendants wrote a letter saying they would like to respond to your application.

Is there a reason that I should follow you and not give them a chance to say anything? Putting aside my own interest in this matter? When you've attacked my integrity.

MR. WITTELS: What we've attacked is the appearance of impropriety. That's what we've attacked.

THE COURT: Yeah well, you call it what you call it.

MR. WITTELS: And no, we believe that all parties should be heard fully and completely in court.

THE COURT: Good. Is there any reason I should be spending anymore time on this until the motion is fully briefed?

MR. WITTELS: No.

THE COURT: Thank you.

Any issues from the defense?

MR. ANDERS: Yes, your Honor.

If I could, I'd like to talk about the ESI process and the schedule and maybe a concern or an issue that I see.

THE COURT: Okay.

MR. ANDERS: Under the schedule entered by the Court defendants were to have provided the C set to plaintiffs by April 11 with our coding designations. We met that deadline.

April 23, this Monday, was the deadline for plaintiffs to provide their challenges to the certain designations. We received that at 9:15 Monday night.

Yesterday our vendor had taken their data file, incorporated it to the database, and by eleven o'clock we were able to start reviewing and seeing the changes.

There are approximately 3300 documents where they

disagreed with our coding designations. I spent a few hours yesterday and a few hours this morning going through them. I've only --

THE COURT: Thirty-three out of how many documents?

MR. ANDERS: 3300 out of about fifteen thousand.

THE COURT: So one in five?

MR. ANDERS: Yes, your Honor.

The pace right now, in terms of -- and then on the schedule itself, your Honor, we had designated April 24 to April 27, Tuesday through Friday of this week, to meet and confer over the disagreements and start the first iteration on Saturday.

Based on how long it's taken to go through just 150, it's going to take longer to go through the 3300.

But my concern, your Honor, and maybe it was addressed by Mr. Wittels in his comments. We are following your Honor's rulings in making coding designations. And it appears plaintiffs still disagree with your Honor's ruling.

Because what I'm noticing is the vast majority of documents where they disagreed with our coding designation had to do with personnel decisions regarding nonplaintiffs. For example, an employee was being transferred. A raise to a different employee who is not a plaintiff.

But I think some of the more -- I don't want to say egregious, but bizarre coding changes were somebody sent in a

resume looking for a position in HR. We marked as not relevant. We get a response that that should be relevant. An employee who is not a plaintiff, they're out-of-office assistant said I will be out of on maternity leave until June 5, please contact so and so. We marked that as not relevant. Plaintiff said that's relevant.

What I tried to do was start breaking it out into broader categories that we can possibly address.

One suggestion would be allow us to go through the 3300.

Another suggestion would be maybe go through five hundred. I think if we go through five hundred, we'll get a good sense of categories, discuss those categories with plaintiff, and then bring that to your Honor.

But my concern is a lot of what I'm seeing is something that your Honor has already ruled on in terms of what is relevant and what's not.

THE COURT: You all want to come back Friday? I'm on trial next week. Unless -- if you want to stick around until after the 3:00 conference, the trial may or may not crater based on some issues that the parties raised at the last time. Otherwise I'm not seeing you next week. But if we do deal with 500, I'm certainly willing to suffer through it on Friday.

Another possibility -- although it's expensive and we can either do it on a loser-pay or on a 50/50 cost shift is for

me to give you a special master who can go through all of these in light of my rulings.

But frankly, Mr. Wittels, if that description of these documents is correct, I am not going to let you destroy the predictive coding protocol process because of a difference of opinion as to relevance on which I have ruled.

MS. BAINS: Your Honor, I'll address this. I don't agree with Mr. Anders' characterization of our coding.

In fact, I got this e-mail yesterday saying that plaintiffs coded things that were individual decisions who are not the named plaintiffs. So did MSL. Many, many, times. There are also at least 20 that I counted manually. Examples of the same exact document being coded as relevant and not relevant. Identical documents. And I have some examples with me.

THE COURT: Well that has to be cleaned up.

MS. BAINS: So I don't think that the answer is coming up with broad categories because, honestly, when we went through the coding we couldn't figure their coding out because of all of the inconsistencies. So it raises a lot of issues with us about the accuracy of the process and the reliability of the process if the coding going into it is going to be inaccurate.

THE COURT: That's certainly true. How many people coded, if we're seeing inconsistent coding?

I know there's a lot of documents and there's a limit to how much a senior person can do at one time.

MR. ANDERS: Either myself, Mr. Brecher, or Tori Shevet looked at every single document.

THE COURT: Did you run any sort of de-duping? Because if they were exact duplicates and one of the three of you coded it as responsive and relevant and someone else coded it as irrelevant; or frankly, if the same person, based on tiredness or whatever, coded it the same way at different times in the morning and the afternoon, you know, that certainly has to be cleaned up.

MR. ANDERS: Our vendor did de-dupe the set. But from what we're told, there will still be the same documents.

For example, attachments may appear to different e-mails. So that attachment may appear multiple times. It was de-duped but there are still certain duplicates or near duplicates in there.

THE COURT: Well that's certainly something that has got to be cleaned up.

MS. BAINS: So plaintiffs would propose that MSL relook at its coding, make sure it's consistent. We can go over --

THE COURT: That's like 20 documents. Or even if it's a hundred out of your 3300.

How do you all want, without extending this schedule

materially, to work through this?

I'm not going to look at 3300 documents. I'll tell you that right now. They can be categorized. They can, you know, you all pull some sort of sample. You could have a special master who gets paid by the hour.

You tell me what you want.

MR. ANDERS: Your Honor I think one initial decision is, from plaintiffs, do you agree to abide by Judge Peck's ruling that --

THE COURT: Asked that way, there is no way they can answer that other than yes unless they are total idiots.

MR. ANDERS: Your Honor, my point is I have examples of documents here that are individualized decisions for nonplaintiffs. And if the position is plaintiffs still think that those are relevant and should be in, well we now have a fundamental disagreement over something I believe your Honor has ruled on.

MS. BAINS: I think we need to understand the thought process behind MSL's coding because in the fifteen minutes I had to review this after getting notice of it, I found at least five documents that MSL itself coded as relevant that were individual personnel decisions for employees who were not plaintiffs.

Now if there's some --

THE COURT: To the extent they're giving you more than

you deserve, I doubt that you really want to complain about that.

MR. ANDERS: Your Honor, some of those e-mails, I recall some of those, it may have been an individualized decision. But within the body of the e-mail there was a comment about you need approval from these people to do this. So we took a more liberal or broader approach and included that.

Yes, it was an individualized decision topic. But there was comments in there about what the process is.

THE COURT: Well the question is where do you want to go from here, sticking to the timeline you have as much as possible.

MS. BAINS: Could we have a moment to confer to come up with a plan from plaintiffs' side?

MR. WITTELS: Can we step out for four minutes or three minutes?

THE COURT: How about a minute.

(Recess)

MR. ANDERS: Your Honor, if I may. We were discussing. There are 3300 documents where there is disagreement. We still haven't, I think, reached a resolution on those e-mails regarding nonplaintiffs -- personnel decisions for nonplaintiffs. Our suggestion would be that plaintiffs go through the 3300, pull out the ones that truly are personnel

decisions for nonplaintiffs.

THE COURT: Let me find out what plaintiffs' view is based on the discussion we just had.

MS. BAINS: Well in our view the documents we marked as relevant that were individual decisions were related to a centralized decision-maker which is central to plaintiffs' case.

THE COURT: That means every decision is "central" because it was made by somebody somewhere about everybody in the company.

MS. BAINS: Well on the face of the document it is, where it says New York is making this approval. It has to go to Paris. I mean --

THE COURT: How many of the 3300 are that and how many are just so and so is getting promoted or so and so sent in a resume asking for a job in HR?

MS. BAINS: I can't give you a number.

THE COURT: Okay. So here's the question -- I'm not reviewing 3300 documents. I'll make that very clear.

Tell me how you want to resolve this. You and they are taking very different interpretations of this Court's rules.

Do you want to give me, each of you, a sample of a hundred documents? And whoever wins or loses as we go through them on Friday, or whenever I have time to deal with all of

you, you know, that rules for all 3300.

Do you want someone to review all 3300 sitting down with you? That will be a special master. That's fine too.

MR. WITTELS: I think, your Honor, taking over for Ms. Bains.

We just got these documents. We haven't had time, very compressed amount of time to look at --

THE COURT: This is your schedule, guys. This is the stipulation you asked me to resolve -- to approve, by the way, at a time when you still didn't want me to decide anything but, hey, that's another story.

Here's the schedule. It's a stipulation both of you asked for. I approved it. You're now woefully behind schedule already at the first wave. We need to resolve that.

I'm asking how you want to resolve that. You gave them the documents Monday. So what do you mean you just got something?

MR. WITTELS: Your Honor, the compressed schedule is based on your Honor having put us on a very short timetable. We wouldn't have agreed to that type of timetable.

THE COURT: But you did.

MR. WITTELS: We had no choice. We were forced into a very short timetable to review as many --

THE COURT: Mr. Wittels, stop.

MR. WITTELS: I'm just saying, your Honor, to review

many thousands of documents. We didn't expect to have so many different coding issues.

THE COURT: Well neither did anyone else.

Let me repeat myself. Give me a solution.

MR. WITTELS: The proposal we -- we need A time to consider the suggestion about whether there should be a special master.

THE COURT: No. You can decide that now.

MR. WITTELS: I need to confer with the rest of the team, your Honor, as to what --

THE COURT: Then you should bring them.

Come on. This is a stall tactic, Mr. Wittels.

That's fine. I can overrule all your objections sight unseen.

MR. WITTELS: Is that what your Honor wants to do without seeing any of our arguments, just overrule us?

THE COURT: I'd like you to be prepared and not stalling because I didn't give you the stay you asked for. That's what it appears to me, counsel.

MR. WITTELS: No, your Honor.

THE COURT: Come on. You're lead counsel. Who do you have to confer with and why?

MR. WITTELS: I want to speak to Janette Wipper and the rest of our team who --

THE COURT: Then why isn't she here?

MR. WITTELS: Your Honor we have three attorneys from my firm here.

THE COURT: Good. Then the three of you make the decision.

Let me hear from defense counsel.

Whoever gives me a view --

MR. WITTELS: Our view would be A we have a sitdown, sitdown meet and confer with --

THE COURT: Why didn't you do that already?

MR. WITTELS: We have it scheduled for Friday.

They have now -- yesterday proposed this broad categories documents for the first time.

They're coming up with solutions. We're coming up with solutions.

They haven't reviewed all of our proposals as to our -- our issues on the coding. We've identified for your Honor, just briefly here today, from our first pass many, many inconsistencies in the documents. We need time to work it out.

THE COURT: You've identified one inconsistency.

MR. WITTELS: Well, to see documents -- there are multiple documents that are marked relevant and irrelevant, which shows that the defendants' methodology is flawed.

THE COURT: Did you give them that counterlist, or is that something you just held in abeyance to use at a motion?

MR. ANDERS: Your Honor, I think when you're going

through the volume of documents that we went through, there are going to be discrepancies in the coding on similar documents. That's the whole reason or one of the reasons why we have this second passthrough where plaintiffs can go review it.

I think that's, your Honor, a separate issue than what I'm dealing with, which is getting -- I never anticipated disagreement on 3300 documents. And when I'm seeing somebody applying for an HR position that's being marked relevant and out of --

THE COURT: Hand up a few of the samples you have.

MR. ANDERS: Yes, your Honor.

MR. WITTELS: Can we see them, please.

MR. ANDERS: Sure.

THE COURT: I'm very tempted to treat this under Rule 37 as cost shifting. I'll look at a number of documents. Whoever wins or loses pays.

MR. WITTELS: Your Honor, we have asked that your Honor defer any ruling on this. We haven't had time to confer with defendants yet. Your Honor is putting the cart before the horse, not allowing us to discuss with the defendants what these issues are, work them out, and now you're stating that we, on the basis of no preparation, no dispute before your Honor, are going to rule from the bench.

THE COURT: There is a dispute.

MR. WITTELS: And perhaps --

THE COURT: Counsel, this may not be fair, but along with the low pay of being a federal judge I get to interrupt you. You don't interrupt me. Period.

As to no preparation and all of that, you or one of your colleagues coded these documents as relevant. I'm going to look at that and give you some guidance. We're not doing briefing on this issue. Whoever reviewed the document from your team is presumably sitting here.

MR. WITTELS: Your Honor, may you tell us which you're looking at.

THE COURT: I'm looking at document NR 6406, 6407. An assistant account executive asking for tuition reimbursement. What's the relevance?

I take it you had marked this as nonresponsive and they marked it as responsive, Mr. Anders?

MR. ANDERS: Yes, your Honor. The Bates number all the ones we marked as nonresponsive start with an NR.

THE COURT: Okay. Got it.

Okay what's the relevance of this document?

If I could read the document for the first time this fast, you guys should be able to tell me why you marked it relevant.

MS. BAINS: This is compensation to a member of a class. One of the issues is pay.

THE COURT: Counsel, how many times are we going

through -- do I have to make the same ruling more than once? Is it a named plaintiff? Is it a policy document?

It's a document saying I want some tuition benefit reimbursement. Maybe if there were a response to it attached somewhere that said in accordance with our policy you're entitled to it or you're not. But that's not what this is.

How on earth is this relevant under the rulings that I've already given you, unless Judge Carter reverses them, assuming it's even one you've taken up with objections. I can't keep track.

MS. BAINS: The way it stands, the way the ruling stands, we don't agree with that because we can't --

THE COURT: So every time -- you stop. Come on counsel. This is really contempt. Every time you disagree you're going to make me and the defendants make the same ruling multiple times? On every single document?

You've got to be kidding me. You are to rereview the 3300. For every document that violates my ruling that I have to read that you don't work out before Monday there will be contempt -- sorry, there will be sanctions under Rule 37 and the court's inherent power starting at a hundred dollars a document.

This is outrageous counsel.

MR. WITTELS: Your Honor, I think that your Honor is now really expressing here a bias, not the appearance --

THE COURT: Yeah, it's a bias that you guys want to run this Court.

That's not a bias counsel.

Sit down.

MR. WITTELS: Your Honor, you're screaming.

THE COURT: Sit down, counsel.

MR. WITTELS: You're screaming at me, your Honor.

THE COURT: I am yelling at you because you are showing contempt for the Court.

You know the law. The bias is bias formed outside of court.

If you are making outrageous ridiculous arguments that even though I've ruled that this document is irrelevant, you have the right to code it as relevant and reargue it. Yes, I'm not a happy camper.

Sit down.

MS. BAINS: Your Honor, may I ask that MSL be required to rereview.

THE COURT: No. You are required to redo this. The only thing you're not -- sorry. The only other thing you are to do, since -- wherever you have found inconsistent coding, you are to give them the document correspondence list. So that document, you know, MSL221B was marked relevant and document NR100 of the same thing or very similar was marked irrelevant.

MS. BAINS: So wasn't that something that they should

have noticed when they were coding it?

THE COURT: They should have.

MS. BAINS: I'm not sure why it should be plaintiffs' burden.

THE COURT: Have you already done it?

MS. BAINS: Not for all of them.

THE COURT: Have you done it for some of them?

MS. BAINS: We did the ones we noticed, but we think there are many more.

THE COURT: Excuse me. Counsel what don't you understand?

You're interrupting me.

For whichever ones you have done it, I'm not saying you have to do anymore, and they will doublecheck. But where you've done it, the game plan of the Court -- maybe not the plaintiffs -- is to try to make this process work.

It requires, as I've said before, all discovery, regardless of whether there were predictive coding, or keywords, or good old-fashioned paper requires lawyers to cooperate. You've got a list. Give it to them. Today. That's the Court's ruling.

MS. BAINS: We're okay with giving the list. However, if there are more --

THE COURT: I'm glad you're okay with giving the list when I've ordered it.

Are you -- what are you guys doing here?

And then you're going to say yes, I'm biased. I'm not biased. I think you guys don't know how to practice law in the Southern District of New York. That's what I think. Based on today's appearance and prior appearances by you and some of your colleagues.

I have ruled. Unless and until Judge Carter overrules me, that is the ruling you live with.

I'm going to do one more of these while waiting for the lawyers on the 3:00.

NR47383. Other than it shows that somebody was on maternity leave, why on earth is that relevant? Where is the policy here? It's the second document they handed me. I don't know if your stack is in a different order.

MR. ANDERS: Your Honor, I gave you the full stack that I brought. I had made copies for plaintiff just so they could have them.

MS. BAINS: We don't have that document.

THE COURT: Come on. It's a two-sentence letter.

Fine. You're not going to talk. I'll tell you the answer.

MR. WITTELS: We will speak, your Honor.

Apparently the defendants have coded a number of documents as relevant that are similar to this. And that's why we are now, have said we believe it's relevant.

THE COURT: What document? Show me the document.

MR. WITTELS: Your Honor, again, we are here without having had an opportunity to meet and confer and go over these with defendants. We didn't bring down the documents. We weren't prepared to argue the discrepancies in their coding.

THE COURT: If the only issue is that it's a discrepancy, that's what you'll work out when you give them that list.

But if the discrepancy is as Mr. Anders described before, which is other people with memos referring to maternity leave talked about the policy or process involved and that's why it was coded relevant, that is relevant. The fact that an individual who is out on maternity leave can't teach a media relations class and refers them to somebody else in the organization does not strike me as the least bit relevant to this case, even if the class was certified.

All I'm telling you all --

MR. WITTELS: Well it also enables us to identify who went on maternity leave because defendants refuse to provide us a list of who went on maternity leave which is relevant and germane to our class.

THE COURT: Yes. It is relevant to your class. And what the class is certified we'll deal with it.

MR. WITTELS: Again we're being hamstrung in our ability to identify who might be in the class.

THE COURT: And you have the right to take objections to Judge Carter, which you're not shy about, so take your objections. Stop arguing with me.

MR. WITTELS: Your Honor, may we have until Wednesday, a week from today, to do what your Honor ordered?

THE COURT: How are we going to get this schedule to work? That's my question.

Let me give you the documents back.

You tell me. You've got a schedule where there's supposed to be a first iteration starting April 28.

How are we going to do that if you're not ready to even sit down with the other side on this until a date after that date?

And I'm not really interested. You know, this schedule was much longer than I contemplated. But you all agreed to it and submitted it to me by stipulation. It appeared you all thought it would work.

I'm not interested in September 7 of 2012 becoming September 7 of 2013.

MR. WITTELS: We need or I would propose, I don't know the defendants' position, we haven't had an opportunity to confer with them.

THE COURT: Well with all due respect counsel, why not?

MR. WITTELS: Well we have a meeting scheduled for

Friday which is why not, your Honor. We were to do that on Friday. We didn't come down here today with any particular agenda.

THE COURT: Get to the point.

MR. WITTELS: We'd ask for two weeks. To push back this schedule.

THE COURT: Ain't happening.

MR. WITTELS: It won't materially affect --

THE COURT: It's not happening.

MR. WITTELS: Two weeks, your Honor, doesn't seem --

THE COURT: Two weeks on this one, which means two weeks on the next one, and the next one, and the next one.

MR. WITTELS: It only -- your Honor, a two-week adjournment doesn't really cause any material change in the ultimate outcome here. Something that's pushed two weeks from --

THE COURT: Are you saying you're going to push everything, or you're going to find -- getting those two weeks back somewhere else in the process?

MR. WITTELS: The proposal would be to push everything.

THE COURT: Yes, of course. Because delay somehow -- I could swear you're sitting at the plaintiffs' table but you don't seem to want too move this case anymore.

This is fine. Democracy has its limits. You all

figure it out.

Bring however many members of your team you need.

No "I'm going to confer with somebody else."

I'll see you Monday, May 7 at 9:30.

You all figure out how you're going to fix this.

But that's as far as I'm willing to give you. And I'm only willing to give you that because I'm on trial all of next week.

MR. ANDERS: Your Honor to confirm plaintiffs are still going to review those 3300, remove whatever --

THE COURT: Let's set a trigger date. How soon can you redo the 3300 on the plaintiffs' side?

MR. WITTELS: Next Thursday, your Honor.

THE COURT: No. Come on. Okay. So much for democracy.

MR. WITTELS: Wednesday, your Honor?

THE COURT: No. Monday of next week you're going to give the new list. Have fun this weekend guys. You're going to give the new list Monday at 9:30. You're going to give it to Mr. Anders. He is going to have until Thursday of next week at 9:30 to review. And you all are going to get together not only this Friday but a week from Friday and workout whatever you can workout. And I will see you May 7 at 9:30.

And in addition the list that you have talked about of duplicates are going to be given to them by five -- make it

6:00 p.m. today.

MR. WITTELS: Your Honor the plaintiffs are being obliged to provide a list of the inconsistencies of the ones we've just had an opportunity to look at.

THE COURT: Yes.

MR. WITTELS: Are you going to instruct the defendants under the same fairness issue --

THE COURT: If anyone finds inconsistencies during the review you will share that and any solution with the other side.

You have the darn list. You want to say even though I've got a partial list, I don't want to give it to the other side. Now do you want to explain to me the reasoning behind that other than obstructionism?

MR. WITTELS: No, your Honor.

We will turn over the list. There is no problem with that. We only have a partial list of the things that we identified.

We're asking that defendants, since they put us to the expense and burden of looking at documents that are coded relevant and irrelevant, that they be ordered to relook at their documents as we've been ordered to relook at ours and produce a list to us of all the documents and explain why those documents --

THE COURT: If they discover, in going through this,

that there are any duplications and that they need to re-categorize either a relevant document as not relevant or vice versa, they will supply you that information as soon as they have it, within --

MR. WITTELS: Can it be under the timetable we've been put under, under Monday at 9:00 a.m.?

MR. ANDERS: Your Honor plaintiff is asking us to rereview the fifteen thousand documents that were initially reviewed.

THE COURT: I assume this can be done on a computer review, no? I mean isn't this a dupe -- de-duping issue or partial de-duping?

MR. ANDERS: Well again, your Honor, I'll talk to our vendor about it. I was told that the set was de-duped the way their system can de-dupe documents. However there still will be certain duplicates based on, again -- different e-mails have the same attachment. That attachment is part of that e-mail. So that will appear multiple times. That won't get de-duped out.

THE COURT: All right. But does that mean that the e-mail in that example was nonresponsive but the attachment made it responsive or what?

MR. ANDERS: Well, your Honor, an example would be when we did this -- the C set review did not include families. It was simply the documents that were hit as a result of our

keyword searches, or plaintiffs' keyword searches, or random sampling. So we will have attachments without the e-mails as part of the C set generation.

When we do the final review, we will review the entire family for the final production.

So, yes, your Honor, there could be -- we could have just looked at an attachment because that's how it was presented as part of a keyword search.

THE COURT: Okay. Whatever.

If you find anything, you'll tell them. I'm not requiring you to rereview the total fifteen thousand.

MR. BRECHER: Judge, if I may, I know you have another conference. Just one other quick issue. Relates to the privilege log.

We have agreed that the parties do not need to log on a privilege log any of the privilege responsive documents that were -- that existed after the commencement of the lawsuit.

They've taken the position, however, that we need to log documents after the filing of the EEOC charge. And our position is that once the commencement of the case, and that we shouldn't have to log, for the same reasons you don't log --

THE COURT: How many documents are we talking about that fit in that category?

MR. BRECHER: Out of the thousands of documents that -- so far I think it was about two hundred -- is it 209?

MR. ANDERS: 210.

MR. BRECHER: There were 210. The second issue is they want us to log nonrelevant documents.

So if a document is a -- let's say an e-mail between general counsel and the president regarding an issue unrelated to this case, they want us to log nonresponsive e-mails. And our position is the rules don't require that. And we don't see any basis for making us take the time and expense and burden of logging nonresponsive privilege documents but they've asked us to do that.

THE COURT: As to the relevant ones -- well, let me hear from plaintiffs.

MS. NURHUSSEIN: Thank you, your Honor.

I just want to address the issue as far as the timing of the documents that are being logged first.

The only thing -- there is no authority for MSL's position that they don't have to log documents that precede the filing of the complaint. The only thing defense counsel appear to rely on, at least in our communications --

THE COURT: How about a certain level of common sense and the Faccio or Redgrave article on wasting time.

But if we're talking two hundred documents, do the log at this point. Let's see what happens. Do the log for that two hundred or 209. A fairly simple one that the computer can spit out. To, from, you know, subject, re, whatever.

MR. BRECHER: I may have misspoke. The nonrelevant are 210.

THE COURT: How many are the relevant ones?

MR. BRECHER: I think we've only had to log maybe 29 relevant documents.

THE COURT: So log the 29.

As to the nonrelevant.

MS. NURHUSSEIN: Yes, your Honor. The reasoning behind that is, as you know, there are obviously disputes in terms of the relevancy determinations and because --

THE COURT: Let's assume -- first of all, you're going to work the relevance out for the nonprivilege documents. Let's assume they're wrong and one of these 209 is relevant. You're not going to get it anyway unless you break the privilege. As long as -- and are these mostly with outside counsel or with inside counsel?

MR. BRECHER: I would say a mix.

THE COURT: Any with outside counsel you don't have to log.

As to in-house counsel, at this stage of the litigation, what do you gain by this?

Plaintiffs?

I mean this is a cost/benefit analysis.

MR. BRECHER: Judge, we think it's consistent with the local Rule 26.2, with Rule 1 and with Rule 26(b)(5).

MS. NURHUSSEIN: Your Honor, our concern is specifically when we're dealing with an ESI protocol --

THE COURT: What's the difference? If this wasn't a an ESI protocol, you would never get a privilege log for nonrelevant documents.

MS. NURHUSSEIN: Our concern, your Honor --

THE COURT: If you can't figure out with the fifteen thousand nonprivilege documents what is going on, I guess my question is this. Paralegal. Two hundred documents. You want to pay for it on the plaintiffs' side?

My inclination is there is no reason to log it. You want it logged, this is one of the cases where I'll consider a checkbook discovery.

You want to pay for it?

MS. NURHUSSEIN: Your Honor, we don't think --

THE COURT: That's a yes or no.

MS. NURHUSSEIN: No, your Honor. We don't think we should have to pay for that.

THE COURT: Fine. They don't have to be logged.

MR. BRECHER: Thank you, your Honor.

MR. EVANS: Paul Evans for Publicis. I have a conflict on May 7. But I don't think there's any need for me to be here at that hearing, if I can be excused.

THE COURT: You managed to almost get off today without saying anything. Let me just ask you one question.

MR. EVANS: Yes, your Honor.

THE COURT: And that is: Is the discovery ongoing and on track for the new cutoff of June 18 as far as you're concerned?

MR. EVANS: It is, your Honor. We met and conferred with the plaintiffs yesterday. We have a deposition scheduled for June 6.

Publicis has produced supplemental discovery of April 2, and we're working out remaining issues with the plaintiffs at this time.

THE COURT: Plaintiffs agree?

MS. NURHUSSEIN: Yes, your Honor. That's accurate.

THE COURT: Okay.

The June 18 deadline is not likely to be extended. We're going to get the Publicis issue briefed so that we can figure out if they're in or out.

MS. NURHUSSEIN: Your Honor, the only thing I would add is, as Mr. Evans pointed out, there are some -- we are still waiting for some documents. So there are some outstanding disputes that we are in the process of working them out. We, obviously, will try our best to meet the deadline.

THE COURT: No. You will meet the deadline. The deadline is nonmovable. If you have problems with them, either Mr. Evans will send a colleague, if you want to resolve this in the hour-and-a-half I'm now setting aside for your conference

on Monday, May 7, or you can decide what date makes sense and we'll have a conference dealing with the Publicis issue.

The June 18 deadline is not going to be extended again. It's been extended once. Let's decide if they're in the case or not in the case. Got it.

MS. NURHUSSEIN: Yes. I understand, your Honor.

THE COURT: Very good.

Anything else?

MS. BAINS: Your Honor, yes.

On the ESI protocol there's a couple issues.

There are several documents that were marked either nonresponsive or responsive that have the statement the -- something like this message --

THE COURT: Your senior lawyer told me a minute ago that you needed more time to work things out with the other side. My 3:00 conference is ready. Is this something that needs to be decided today?

MR. WITTELS: That's fine, your Honor. The defendants have stood up and made multiple requests of your Honor about things that we were not here to discuss and you allowed them to do it. We didn't want --

THE COURT: Counsel.

MR. WITTELS: I'm not interrupting, your Honor. Yes.

THE COURT: You're not?

MR. WITTELS: No, I'm not. I wasn't finished --

THE COURT: Remember I judge credibility. You're not doing well with that last statement. Interrupting me with the words I'm not interrupting you.

However, I want to be fair to you. So you can sit around. When I'm done with the 3:00 we'll take more issues. Sorry for the defendants. Sit in the back. We're going to deal with the -- Alli case.

MR. WITTELS: Well your Honor we can bring them up with them when we meet with them.

THE COURT: Counsel which is it you want? You're complaining I'm being unfair to you. So now I say I'll hear you more and you don't want to do it.

MR. WITTELS: Your Honor, you've given us until 6:00 to give them things.

THE COURT: You can have until 8:00 to give them the list.

MR. WITTELS: Your Honor why don't we --

THE COURT: Whatever you want. A minute ago you said I was being unfair to you by not letting you do more. I'm letting you do more. I can't win with you. Tell me what you want, Mr. Wittels. Either choice. I can deal with you after the 3:00 conference or we can hold it until May 7.

MR. WITTELS: We'll try to deal with the defendants if possible. If we can't work it out, we'll bring it to your Honor on May 7.

THE COURT: Excellent.

Both sides are required to purchase the transcript. The usual rules apply. That is the Court's ruling.

If you are taking objections to Judge Carter you know the drill. The 14 days begins running immediately regardless of how soon you get the transcript.

Quickly make your arrangements with the reporter.

Folks on Alli move on up.

(Adjourned)